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July 14, 2004

Michael Isenberg, Esquire
Telecommunications Director
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: Tariff Transmittal No. 04-49 – Enterprise Switching and Four Line Carve-Out Rule (D.T.E. Tariff No. 17)

Dear Mr. Isenberg:

Verizon Massachusetts ("Verizon MA") is responding to the comments filed by AT&T Communications of New England, Inc., ACC National Telecom Corp., and Teleport Communications Boston, Inc. (collectively referred to as "AT&T") and the Joint CLECs[1] on July 9, 2004, regarding Verizon MA's June 23, 2004, tariff filing that implements provisions of the Federal Communications Commission's ("FCC") *Triennial Review Order*.[2] The tariff modifications relate to Enterprise Switching, which includes customers with DS1 capacity and above loops, as well as customers subject to the FCC's Four-Line Carve-Out Rule. As explained below, the parties' arguments in support of suspension or dismissal of the tariff filing are without merit, and nothing more than

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1 The following competitive local exchange carriers are collectively referred to as the "Joint CLECs" for purposes of these comments: ARC Networks Inc., d/b/a InfoHighway Communications Corp., Broadview Networks Inc., Broadview NP Acquisition Corp., BullsEye Telecom Inc., and Spectrotel Inc.

2 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 359 F.3d 554, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) ("*USTA II*"). The D.C. Circuit's mandate of the *USTA II* decision was issued on June 16, 2004.

efforts to have the Department ignore federal law. Accordingly, the Department should allow Verizon MA's proposed tariff changes to become effective without suspension.

BACKGROUND

In its *Triennial Review Order*, the FCC found that, on a national basis, competitive local exchange carriers ("CLECs") are not impaired without access to unbundled local circuit switching when serving the enterprise market. *Triennial Review Order*, at ¶¶ 298-99, 451. Recognizing that a geographically specific analysis could possibly demonstrate impairment in certain local markets, the FCC permitted state commissions to rebut the national finding of no impairment by petitioning the FCC within 90 days from the effective date of that Order for an affirmative finding of impairment for enterprise customers being served by DS1 capacity and above loops. *Id*. at ¶ 455. The Department ruled in D.T.E. 03-59 that there was "no basis … to file a petition with the FCC for a waiver of its Triennial Review Order finding of no impairment for local switching in the enterprise markets." D.T.E. 03-59, *Order*, at 20 (November 25, 2003). The Department further stated that by taking no action, "the FCC's national findings are the default findings in Massachusetts and are self-executing." *Id*. at 18.

In addition, the FCC in its *Triennial Review Order* directed incumbent local exchange carriers ("ILECs") to "comply with the Four-Line Carve-Out Rule" established in the *UNE Remand Order*.[3] 47 C.F.R. 51.319(d)(3)(ii). Thus, the FCC determined that ILECs are not obligated to provide unbundled local circuit switching to competing carriers for serving customers with four or more DS0 loops in density zone one of the top 50 Metropolitan Service Areas ("MSA"). *Id*. at ¶ 525.

Accordingly, the FCC has already made a determination that there are sufficient competitive alternatives available to serve these end-user customers, and that CLECs are not "impaired" without unbundled access at TELRIC rates to unbundled switching in these two situations. The FCC's rules preempt state commissions - including the Department - from reaching a different conclusion.

DISCUSSION

In their comments, AT&T and the Joint CLECs raise a host of arguments in an effort to have the Department ignore the FCC's determinations. The Department should not take the bait.

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[3] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3822-98, at ¶¶ 276-98 (1999) ("*UNE Remand Order*"), *vacated and remanded, United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

As explained above, the FCC made a nationwide finding of "no impairment" in the enterprise switching market and implemented that determination by eliminating the switching UNE when provided to customers with DS1 capacity and above loops and by applying the Four-Line Carve-Out Rule established in the *UNE Remand Order*. The Department is not at liberty to override those federal determinations and the FCC's rules. 47 C.F.R. § 51.319(d)(3). Verizon MA's proposed tariff filing appropriately implements binding federal law and should be allowed to become effective as proposed. Indeed, neither AT&T nor the Joint CLECs seriously contend that Verizon MA's filing does not properly implement federal law. Rather, their arguments are attempts to convince the Department that some independent basis exists for it to require Verizon MA to continue providing UNE switching for enterprise customers. These claims are without merit.

First, AT&T asserts that Verizon MA committed to provide unbundled switching and UNE Platform ("UNE-P") to obtain upward pricing flexibility for its retail business services in D.T.E. 01-31. AT&T's Comments, at 4-5. This is simply wrong. Verizon MA did not commit to continue offering UNE-P or present this as a condition of the Department's adoption of the Alternative Regulation Plan (the "Plan") in D.T.E. 01-31. Indeed, AT&T does not cite to any statement by Verizon MA in which this alleged commitment was made.

While the Department stated that UNE-P contributed to the competitiveness of the business market,[4] it did not rule that Verizon MA must continue to offer such UNE arrangements regardless of any change in federal law. The availability of UNE-P was one factor, among several factors, that the Department took into account in determining the degree of regulation appropriate for Verizon MA in the business market. The fact that some unbundling obligations have since been eliminated does not give the Department the authority to override a federal mandate.

Second, AT&T claims that the Department's determination in D.P.U. 1731 that Verizon MA is the "carrier of last resort" obligates the Company to continue to provide UNEs and UNE combinations. AT&T's Comments, at 9-10. This is plainly without merit. The context of D.P.U. 1731 was exclusively retail, not wholesale, services. AT&T's attempt to extrapolate the Department's finding to apply to wholesale services is clearly wrong.

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[4] It should be noted that if approved, this tariff filing will have no impact on the majority of UNE-P arrangements in Massachusetts. Most CLECs are not even affected by the tariff changes because they obtain UNEs pursuant to interconnection agreements. In addition, the tariff changes affect only a limited segment of the business market. The Four-Line Carve-Out Rule, for instances, applies in only 11 offices in and around Boston – the most competitive business area in the state where CLECs have deployed their own facilities. Therefore, AT&T and the Joint CLECs' arguments regarding the competitive effects of this filing are greatly exaggerated.

Third, AT&T's claim that the Department has "the power to investigate the unbundling of and interconnection with Verizon's network elements under state law" also provides no basis for suspension or dismissal of the proposed tariff. AT&T's Comments, at 10. Even assuming that the Department has the authority to order unbundling as a matter of state law – a matter that Verizon MA contests – the Department has never exercised that state law authority. The fact is that the Department has rested its determinations on Verizon MA's unbundling obligations solely and exclusively under federal law. Now that the FCC has relieved ILECs from the obligation to provide enterprise switching as a UNE (consisting of customers served by DS1 capacity and above loops as well as those subject to the Four-Line Carve-Out Rule), the Department should allow Verizon MA to implement that federal determination.

Moreover, there is no legal basis for a state commission to act here. The *USTA II* decision makes clear that the unbundling required under the FCC's prior regulations is inconsistent with federal law and that no unbundling can be ordered in the absence of a valid finding *by the FCC* of impairment under 47 U.S.C. § 251(d)(2). The D.C. Circuit also unequivocally held that only the FCC has the authority to make that impairment finding; the FCC cannot delegate that authority to state commissions. *See* 345 F.3d at 565-68. Likewise, courts of appeal have repeatedly found that the Telecommunications Act of 1996 (the "Act") preempts state commission's attempt to impose unbundling obligations outside of the Section 252 process that Congress established. *See*, *e.g.*, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir. 2003); *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002).

In short, contrary to AT&T's suggestion, the D.C. Circuit's vacatur of specific FCC unbundling rules does not leave a void for state commissions to fill. As previously stated, the FCC has made a finding of no impairment under section 251(d)(2) regarding enterprise switching customers and customers served by four or more DS0 loops in density zone one of the top 50 MSAs. Given that Congress has given the FCC – not the Department – sole authority to make impairment determinations, any attempt by the Department to usurp that role and require unbundling at TELRIC rates would be fundamentally *inconsistent* with federal law by re-imposing unbundling requirements where the Act, by its terms, does not *permit* it.

Fourth, AT&T and the Joint CLECs contend that Verizon MA's proposed tariff ignores the continuing unbundling obligations under Section 271. AT&T's Comments, at 15-17; Joint CLEC Comments, at 3. Their claim is without merit.

The FCC expressly stated in its *Triennial Review Order* that the Section 251 pricing and UNE combination rules do *not* apply to portions of an incumbent's network that must be provided solely pursuant to Section 271. *Id*. at ¶¶ 657-59. In particular, the FCC held that "[i]f a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are

determined in accordance with sections 201(b) and 202(a)." *Id*. at ¶¶ 662-63 (citing *UNE Remand Order*, 15 FCC Rcd. at 3905, ¶ 470).

The applicable standard under Sections 201 and 202 is just, reasonable and nondiscriminatory rates, not TELRIC-based pricing, as required for unbundled network elements under Sections 251 and 252 of the Act. The Department acknowledged that fact in D.T.E. 03-59. *See* D.T.E. 03-59, *Order*, at 7 (January 23, 2004). Moreover, the Department would not have jurisdiction to review the reasonableness of rates for Section 271 services because 47 U.S.C. § 271(d)(6) grants enforcement authority to the FCC to ensure that Verizon continues to comply with the market opening requirements of Section 271, not state commissions. *Triennial Review Order*, at ¶¶ 664-65. Indeed, the Department in D.T.E. 03-59 recognized that it "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 obligations is before the FCC." D.T.E. 03-59, *Order*, at 19 (November 25, 2003).

Fifth, AT&T's argument that Verizon MA should be estopped from applying the Four-Line Carve-Out Rule because the Company classified all customers at the DS0 level as mass market customers in D.T.E. 03-60 is patently wrong. AT&T's Comments, at 13. In that docket, the issue was application of the FCC's triggers for mass market switching in the context of the FCC delegation in the *Triennial Review Order*. The D.C. Circuit struck down that delegation of authority in *USTA II* and vacated the FCC's rules relating to mass market switching (among several other UNEs). The D.C. Circuit did not invalidate the FCC's rules relating to enterprise switching. It is ludicrous to suggest that the Department can refuse to apply federal law that is in force because Verizon MA presented evidence relating to a standard that the *USTA II* decision invalidated.

Likewise, AT&T is wrong in arguing that the Four-Line Carve-Out Rule does not relieve Verizon MA of its obligation to provide unbundled switching because the Company did not implement this rule sooner. AT&T's Comments, at 12. No such condition exists under federal law. The Four-Line Carve-Out Rule set forth in 47 C.F.R. 51.319(d)(3) is clear; ILECs are not required to provide unbundled switching to CLECs to serve customers with four or more DS0 loops in density zone one of the top 50 MSAs. Verizon MA's proposed tariff complies fully with the FCC's rules.

Sixth, AT&T incorrectly states that Verizon MA is not exempt from providing unbundled local circuit switching to customers with four or more DS0 loops in density zone one of the top 50 MSAs unless Verizon MA "also offers nondiscriminatory access to EELs at cost-based rates." AT&T's Comments, at 14. The FCC recognized in its *Triennial Review Order* that this requirement has become moot in light of the U.S. Supreme Court's decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 531-38 (2002). *Triennial Review Order*, at ¶ 525 n.1608. In any event, Verizon MA does provide EEL arrangements consistent with its obligations under federal law.

Seventh, contrary to AT&T's claims, Verizon MA's proposed tariff filing does not conflict with the Department's June 15, 2004, letter ruling in D.T.E. 03-60. AT&T's Comments, at 3-4. On May 18, 2004, Verizon MA provided CLECs with interconnection agreements with 90-days notice of the elimination of enterprise switching. Nothing in the Department's June 15th letter ruling precludes Verizon MA from seeking to amend its tariff in compliance with mandatory FCC rules for enterprise switching.

Finally, AT&T claims that Verizon MA incorrectly identifies the central offices subject to the Four-Line Carve-Out Rule. AT&T's Comments, at 21-22. AT&T is incorrect. The density zones referred to in the FCC rules are not the UNE density zones established by state commissions, as AT&T contends. Rather, the density zones applicable to the Four-Line Carve-Out Rule are those established by the FCC for access pricing.[5] 47 C.F.R. § 69.124; *see also UNE Remand Order*, at ¶ 278 n. 550. Therefore, AT&T's claim that Verizon MA has not complied with the FCC's rule is wrong.

CONCLUSION

For the foregoing reasons, AT&T's and the Joint CLECs' Comments regarding Verizon MA's proposed tariff provide no basis for the Department to suspend the filing. That filing is in full compliance with binding federal law, and there is no reasonable basis to delay its approval, as suggested by AT&T and the Joint CLECs. Accordingly, the Department should allow the proposed tariff to become effective as filed.

Very truly yours,

/s/Barbara Anne Sousa

Barbara Anne Sousa

cc: Mary L. Cottrell, Secretary
April Mulqueen, Esq., Assistant Telecommunications Director
DTE 03-59 & 03-60 Service Lists

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5 The list of central offices included in Verizon MA's June 23, 2004, tariff filing for the Boston MSA reflects density zone one central offices, as defined on January 1, 1999, in accordance with the FCC's *UNE Remand Order*, at ¶ 285 (exception to local switching unbundling requirement applicable to the FCC's density zone one, as defined on January 1, 1999). *See* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 4.